

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs, and

PUYALLUP TRIBE OF INDIANS, *et al.*,

Plaintiff-Intervenors,

v.

ELECTRON HYDRO, LLC,

Defendant.

Case No. 2:20-cv-01746-JCC

UNITED STATES'
OPPOSITION TO MOTION TO
STAY

NOTE ON MOTION CALENDAR:
February 11, 2022

This Document Relates To:
BOTH CASES

**UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO STAY
DISCOVERY PENDING RESOLUTION OF CRIMINAL PROCEEDINGS**

The Court should exercise its discretion to deny Defendant's Motion to Stay Discovery Pending Resolution of Criminal Proceedings, Dkt. # 46 ("Motion"). Defendant does not meet its burden to show that it will suffer "substantial prejudice" if civil and criminal proceedings continue in parallel. See Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995) (citations omitted). In contrast, a stay will impede Plaintiffs from obtaining effective relief because it would allow ongoing environmental harm caused by the Defendant's pollutants that remain in the Puyallup River to continue and would make remedying that harm more difficult.

I. BACKGROUND

From approximately July 29, 2020 to October 28, 2020, Defendant Electron Hydro discharged at least 617 square feet of artificial turf, including at least four cubic yards of toxic crumb rubber, into waters of the United States, contaminating portions of at least nineteen miles of the Puyallup River. Complaint, Dkt. #1, ¶¶ 48-65. In the same period, Electron Hydro constructed a diversion rock spillway by discharging approximately 6,000 cubic yards of rock, gravel, and other fill material, which remains in the river to this day, without permit authorization to do so. Decl. of Charissa Bujak ¶ 10; Proposed Amended Complaint, Dkt. # 51-2, ¶¶ 75-77. The United States promptly commenced this action under the Clean Water Act ("CWA") on November 25, 2020, seeking civil penalties and an injunction prohibiting Electron Hydro from further discharging pollutants into waters of the United States and requiring it to restore and/or mitigate the environmental harm its discharges had already caused. Dkt. # 1, ¶ 4.

The United States has sought to bring this matter to a prompt resolution, by settlement or judgment, and has diligently pursued discovery efforts to that end. See Decl. of John Broderick ¶¶ 2-12. Electron Hydro now asks this Court to put those efforts on hold indefinitely while newly-filed criminal charges against it and its COO, Thom Fischer, are resolved in state court.

II. ARGUMENT

While it is true that whether to grant a stay is within the discretion of the Court, Motion at 3:9-14, a litigant seeking to stay one proceeding in favor of another “must make out a clear case of hardship or inequity” if “there is even a fair possibility that the stay . . . will work damage to someone else.” Landis v. North American Co., 299 U.S. 248, 255 (1936) (denying stay). For that reason, such stays are granted “only in rare circumstances.” Id. In this Circuit, a movant must show that it will suffer “substantial prejudice” if parallel proceedings go forward. See Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995) (denying stay) (citations omitted); accord Lockyer v. Mirant Corp., 398 F.3d 1098, 1112 (9th Cir. 2005) (denying stay and quoting Landis’ requirement for a clear showing of hardship or inequity if there is “even a fair possibility” that a stay will harm another’s interests). Even then, the potential prejudice to the movant is but one of five factors the Court must weigh to determine whether a stay is appropriate:

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Keating, 45 F.3d at 325.

The United States, both on behalf of the public and in its own right, will suffer significant harm if this case is stayed. Meanwhile, Electron Hydro does not address, let alone carry, its burden to show that it or Mr. Fischer will suffer substantial prejudice in the absence of a stay—nor will they suffer such prejudice. Each of the other factors likewise weighs against granting a stay. This is not the “rare circumstance” in which a stay is called for. Landis, 299 U.S. at 255.

A. The Interests of the Plaintiffs

The United States' interest in proceeding expeditiously weighs strongly in favor of denying Electron Hydro's request for a stay because any delay in resolving this matter will prejudice the United States' ability to obtain complete relief. See Motion at 4:13-15 (acknowledging this factor weighs against stay where stay threatens the relief plaintiff seeks). Even where there are parallel criminal proceedings, courts are reluctant to stay governmental civil enforcement cases asserting claims for disgorgement against defendants who may hide or shift assets because such a stay could preclude effective relief. See, e.g., Fed. Sav. & Loan Ins. Corp. v. Molinaro 889 F.2d 899, 903 (9th Cir. 1989); F.T.C. v. J.K. Publications, Inc., 99 F. Supp. 2d 1176, 1197 (C.D. Cal. 2000). Here, the issue is not that Defendant's assets may dissipate, but rather that the injunctive relief the government seeks—restoration and mitigation of the environmental damage Defendant caused—will be impeded by delay.

Artificial turf, including crumb rubber, remains in the Puyallup River to the present day. See Decl. of Eric Marks at ¶ 4. Components of artificial turf and crumb rubber contain chemicals that exhibit toxicity to aquatic species. See Bujak Decl. ¶ 13. Crumb rubber, in particular, contains a wide variety of toxins, has been shown to be acutely toxic to Coho salmon, and may induce mortality in similar species. Id. Crumb rubber and small particles of artificial turf may also cause physical damage to fish that consume them. Id. As Defendant acknowledges, the Puyallup River is home to several species of fish protected under the Endangered Species Act (ESA), so the impact of these pollutants may be significant. See Joint Status Report, Dkt. # 13 at pg. 2:6-9. The unpermitted diversion rock spillway also remains in the Puyallup River today and may further harm ESA-protected species by impeding successful upstream and downstream migration. See Bujak Decl. ¶ 14. The longer all of these pollutants

1 remain in the river, the more harm they will cause, and the more difficult it will become to
2 remove them all and to restore and/or mitigate the harm they have caused. See Bujak Decl. ¶¶
3 15-16. Thus, any stay will impede the United States from obtaining effective relief.

4 Contrary to Defendant's unfounded assertion, Motion at 5:2, the United States has acted
5 with urgency to obtain this relief since learning of the Defendant's unlawful conduct. The
6 Environmental Protection Agency (EPA) investigated and referred civil claims to the
7 Department of Justice less than three months after the first discharge of pollutants, and the
8 United States filed its Complaint less than one month later. Decl. of Michele Jencius ¶ 6. The
9 United States served its first discovery requests within approximately one month of the Rule
10 26(f) conference and has reviewed close to 7,500 documents. Broderick Decl. ¶¶ 2-3.
11 Furthermore, the United States noticed depositions of two Electron Hydro employees for January
12 18 and 19, 2022, id. ¶ 11, which have been delayed as a result of the criminal proceeding. Id. ¶¶
13 12-14; Minute Order, Dkt. # 50. That the United States has not yet conducted a deposition,
14 Motion at 4:26-5:1, is not reflective of any lack of urgency.

15 Moreover, the United States has a particular interest in avoiding delay that may damage
16 public confidence in a governmental enforcement scheme. See Keating, 45 F.3d at 326 (noting
17 the strong interest of the Office of Thrift Supervision in speedy resolution due to the damage
18 delay would cause to the public's confidence in the enforcement scheme for thrift institutions
19 given heightened public interest in the case). A stay of this case will stymie EPA's efforts to
20 enforce the CWA in favor of a state criminal prosecution under state laws that will not deliver
21 CWA injunctive relief, threatening the regulated community's and the general public's
22 confidence in EPA's regulatory scheme under the CWA. Jencius Decl. ¶¶ 11-13. And there is
23 heightened public interest in this case, evidenced by the intervention of two non-profit

environmental organizations on behalf of their members. See Motion to Intervene, Dkt. # 24 (filed by Communities for a Healthy Bay and Puget Soundkeeper Alliance). Thus, here, as in other federal-plaintiff cases, the interest of the United States as plaintiff on behalf of the public weighs against a stay. See Keating, 45 F.3d at 324.

Notably, Defendant cites only three cases involving federal government plaintiffs where a stay was granted, and in all of them, the stay was sought by the government plaintiff itself in favor of a criminal proceeding under the same statute. See United States v. Acquest Transit, LLC, 2009 WL 5732334, at *1 (W.D.N.Y. Nov. 4, 2009) (granting stay in CWA action on motion by the United States to protect criminal CWA investigation from civil discovery);¹ United States v. ATP Oil & Gas Corp., 2013 WL 6184991 (E.D. La. Nov. 26, 2013) (granting stay in CWA action on motion by the United States to protect criminal CWA investigation from civil discovery); SEC v. Nicholas, 569 F. Supp. 2d 1065, 1071-72 (C.D. Cal. 2008) (granting stay in securities fraud action on motion by the United States in favor of criminal securities fraud action). In contrast to the present matter, in each of these cases the parallel proceedings enforced the same federal regulatory scheme, mitigating the risk of undermining public confidence in that scheme. In every other case involving a federal government plaintiff cited by Electron Hydro, the court sustained the government's objections and denied the requested stay. See Molinaro, 889 F.2d at 899; Keating, 45 F.3d at 322; J.K. Publications, 99 F. Supp. 2d at 1176; S.E.C. v. Dresser Indus. Inc., 628 F.2d 1368 (D.C. Cir. 1980); cf. Braswell v. United States, 487 U.S. 99, 119 (1988) (affirming denial of motion to quash).²

¹ Defendant cites a later ruling in this case that refers to the initial stay in its recitation of the procedural history. Motion at 4:11-12 (citing 2016 WL 9526566, at *1 (W.D.N.Y. 2016)).

² These cases denied or affirmed denial of relief notwithstanding that the criminal and civil proceedings in each "arose from the same nucleus of facts," Motion at 5:10-11, as most such cases necessarily do. This is not to say that such stays are never granted. See, e.g., SEC v. John

During any stay of this case, the ongoing environmental damage caused by Defendant will continue unabated, making mitigation or restoration more difficult or even impossible. Moreover, EPA's programmatic interests in the enforcement of the CWA will go unvindicated. These harms to the United States' interests are enough on their own to deny the Motion absent substantial prejudice to Defendant based on a "clear case of hardship or inequity." See Landis, 299 U.S. at 255; Keating, 45 F.3d at 324.

B. Burden on Defendant and Mr. Fischer

Defendant has not made a "clear case of inequity or hardship" to support a finding that it or Mr. Fischer will suffer "substantial prejudice" without a stay. Nearly all of the purported burdens Defendant identifies arise, at core, from the same concern—that Mr. Fischer will choose to assert his Fifth Amendment rights against self-incrimination rather than assisting his own or Electron Hydro's defense. Motion at 5:23-6:10. But the necessity of this choice, common to all parallel proceedings, is insufficient on its own to justify a stay:

A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.

Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (cited by Keating, 45 F.3d at 326). For that reason, as this Court has emphasized, "[a] stay of [a] civil case' to permit conclusion of a related criminal prosecution has been characterized as 'an extraordinary remedy.'" Whitsitt v. Allen & Assocs., LLC, 2014 WL 11997865, at *2 (W.D. Wash. Mar. 27, 2014) (Coughenour, J.)

Hyun Joon Min, 2009 WL 10676446, at *2 (June 18, 2009) (Coughenour, J.) (granting "relatively short stay" of four months where there would be no prejudice to the government).

(citations omitted). Even where Fifth Amendment rights may be significantly implicated by civil litigation, a stay is not necessary if those rights “can be protected through less drastic means.”

Id.

At the outset, Electron Hydro’s admission that it has no Fifth Amendment right to protect, Motion at 5:23-24, is fatal to its assertion of any burden it may face if a stay is not granted. In the seminal Supreme Court opinion Electron Hydro cites, the Court refused to quash a subpoena for corporate records on the basis that production of those records could implicate a corporate officer’s Fifth Amendment rights. Braswell, 487 U.S. at 119. Allowing a corporation to withhold records on that basis “would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.” Id. at 110. Nor can a corporation refuse to answer interrogatories by claiming that doing so might incriminate a corporate officer. Instead, such a corporate defendant must “appoint an agent who could, without fear of self-incrimination, furnish such requested information as [is] available to the corporation.” United States v. Kordel, 397 U.S. 1, 8 (1970).³ Likewise, a corporate defendant must provide an adequately prepared witness for a 30(b)(6) deposition, even if “adequate preparation” may be difficult because its individual co-defendant employees and officers refuse to assist for fear of self-incrimination. See Chicago v. Reliable Truck Parts Co., Inc. 768 F. Supp. 642, 646-47 (N.D. Ill. 1991). Thus, there is no basis to stay discovery as to Electron Hydro.

Electron Hydro’s reliance on Chagolla v. City of Chicago, Motion at 6:2, is misplaced. In that case, the court actually refused to stay paper discovery as to the City of Chicago even

³ The Supreme Court recognized that there might be nobody who can answer interrogatories addressed to a corporation “without subjecting himself to a ‘real and appreciable’ risk of self-incrimination.” Id. at 9. However, there are many individuals who can help Electron Hydro answer interrogatories, including inter alia, its Director of Regulatory and Environmental Affairs, who does not face criminal prosecution. See Broderick Decl. ¶¶ 7, 9.

though “its ability to defend itself [was] impaired because of the unavailability of the testimony” of individuals due to their assertion of their Fifth Amendment rights. See 529 F. Supp. 2d 941, 948 (N.D. Ill. 2008). The other cases Electron Hydro cites are similarly unavailing. See Motion at 6:3-4. In Delphi Connection Systems, LLC v. Koehlke Components, Inc., the court found there was no public interest in the private party litigation, in contrast to the criminal prosecution that would “better serve” the public interest. 2012 WL 12895670 at *2 (C.D. Cal. Oct. 17, 2012). Moreover, the parties had already agreed to stay the case as to the individual defendant and the only relief Delphi sought—monetary damages—would have been unaffected by a stay. Id. Those facts stand in stark contrast to the instant case, where the United States on behalf of the public has a strong interest in prosecuting its civil enforcement action against Defendant, the parties have not agreed to any stay, and the relief the United States seeks would be directly threatened by a stay. And the court in Chrome Hearts, LLC v. Old School Fairfax, Inc., granted a stay of only the individual defendant’s deposition, and even then only for a three month period. 2017 WL 8943005, at *2 (C.D. Cal. Aug. 25, 2017). Indeed, Chrome Hearts specifically considered and rejected the exact claim Electron Hydro makes here, Motion at 6:5-10, that a corporate defendant is entitled to a stay merely because an individual’s “participation is central to it being able to meaningful[ly] put forward a defense, and [that individual] would be forced to choose between asserting his Fifth Amendment right and assisting in [the corporation’s] defense.” Id. at *4.

The mere fact that Mr. Fischer has been criminally charged, Motion at 5:15-22, also does not require a stay as to any claims against him. See, e.g., ESG Capital Partners v. Stratos, 22 F. Supp. 3d. 1042, 1045-1046 (C.D. Cal. 2014) (declining to stay even after indictment and noting that even implication of Fifth Amendment rights by indictment “does not support granting a stay

1 unless the defendant can show other compelling factors as described in Keating.”) (citations
 2 omitted); SEC v. Boucher, 2021 WL 5178519, at *2-3 (S.D. Cal. Nov. 8, 2021) (declining to stay
 3 after indictment); Apothio, LLC v. Kern County, 2021 WL 75243 (E.D. Cal. Jan. 8, 2021)
 4 (declining to stay after misdemeanor charges). Moreover, a stay will prolong the ongoing harm
 5 caused by the artificial turf, crumb rubber, and unpermitted fill material remaining in the
 6 Puyallup River, distinguishing this case from others where the harms caused by the defendant’s
 7 conduct had ceased. See, e.g., John Hyun Joon Min, 2009 WL 10676446, at *2 (finding a short
 8 stay justified after finding no prejudice to plaintiff because defendant, under criminal indictment,
 9 was already enjoined as condition of release from participating in securities trading or holding a
 10 job with access to cash or negotiable instruments). An indefinite stay under these circumstances
 11 would severely prejudice Plaintiffs, while Defendant and Mr. Fischer would not suffer prejudice
 12 beyond that ordinarily attendant to a civil litigant under parallel criminal prosecution. Such
 13 ordinary prejudice is insufficient to warrant a stay. Keating, 45 F.3d at 324.

14 Moreover, less drastic means than a complete stay of discovery are sufficient to protect
 15 Mr. Fischer’s Fifth Amendment rights. See Whitsitt, 2014 WL 11997865, at *2 (Coughenour,
 16 J.). For example, the United States stands ready to stipulate to delay Mr. Fischer’s deposition
 17 until near the end of discovery, currently set to close on July 30, 2022. Should more time be
 18 needed to resolve his criminal matter, Defendant or Mr. Fischer can move for appropriate relief
 19 based on whatever the facts are at that time.⁴ Other courts have adopted similarly precisely
 20 crafted measures in similar circumstances. See, e.g., Chrome Hearts, 2007 WL 89243005, at *2
 21 (staying deposition of criminally charged individual defendant for three months while allowing
 22 all other discovery, including against corporate defendant, to proceed). Especially given that no

⁴ The United States reserves the right to oppose any such request for further relief.

1 date has been set for Mr. Fischer's criminal trial, an indefinite stay of discovery as to him is not
2 warranted.

3 Defendant's remaining concern, that the United States has provided and may provide
4 information to state prosecutors to the detriment of its and Mr. Fischer's criminal defense,
5 Motion at 6:16-20, ignores the fact that EPA produced records to the state in response to a
6 request under the Freedom of Information Act (FOIA) and that most of the records released were
7 provided to EPA by Electron Hydro, Jencius Decl. ¶¶ 8-10, which has no Fifth Amendment
8 rights to protect.⁵ Moreover, none of the circumstances that might raise serious concerns about
9 civil discovery being potentially available to a criminal proceeding are present here. Electron
10 Hydro makes no suggestion that the United States brought this action "solely to obtain evidence
11 for [a] criminal prosecution." Kordel, 397 U.S. at 11-12. Nor is there any suggestion that EPA
12 or the United States are a mere "tool" of a criminal proceeding or that the criminal investigation
13 has improperly accessed inappropriate material. See S.E.C. v. Sandifur, 2006 WL 1719920, at
14 *2 (W.D. Was. June 19, 2006) (denying stay notwithstanding that criminal investigators were
15 using material obtained from civil proceedings); cf. United States v. Stringer, 535 F.3d 929, 939
16 (9th Cir. 2008) (holding there was no constitutional impropriety in SEC sharing evidence
17 obtained in civil investigation with criminal prosecutors where, inter alia, the civil case was not
18 solely initiated for that purpose).

19 The only cases Defendant cites in support of its theory, Motion at 6:11-20, are ones in
20 which the United States sought to stay a civil action to prevent criminal defendants from gaining
21 insight into a related criminal prosecution. See Nicholas, 569 F. Supp. 2d at 1071-72 (United

⁵ EPA also produced non-FOIA exempt agency records. Jencius Decl. at ¶ 9. EPA's response to the state's FOIA request is not yet complete. Id. at ¶ 10.

States intervened to seek stay); Ashworth v. Albers Med. Inc., 229 F.R.D. 527, 532 (S.D.W.Va. 2005) (same). The Court should reject Defendant's effort to turn these cases on their heads.

C. Interest of the Court in Efficient Administration of Justice

A stay of all discovery would harm the Court's interest in the efficient administration of justice. Unlike the primary case on which Defendant relies, resolution of the state criminal case is not necessary for this civil action to proceed. Motion at 6:21-22, citing Eggleston v. Pierce County, 99 F. Supp. 2d 1280, 1282 (W.D. Wash. 2000) (staying Section 1983 action for unlawful search and seizure during criminal appeal of conviction because appeal would determine whether search and seizure was unlawful). And unlike In re Adelphia Communications Securities Litigation, Motion at 6:26-27, this matter does not present overlapping civil, criminal, and bankruptcy proceedings involving the same facts and same defendants in multiple federal courts. See 2003 WL 22358819, at *1-2 (E.D. Pa. May 13, 2003). Rather, the Defendant here seeks to delay indefinitely a federal civil enforcement case that has been pending for sixteen months in favor of a state criminal prosecution in which no trial date has been set. Proceeding here would not waste this Court's resources because the two cases are proceeding in different courts, under different laws, and have different remedies.

Finally, the Court should reject Defendant's argument that a complete stay is required because other strawman "intermediate steps," which no party has suggested or would support, are inefficient. Motion at 6:28-7:9. At most, given that only Mr. Fischer has Fifth Amendment rights to protect, it might make sense to delay his deposition. See supra 9:15-20. Allowing all other discovery to proceed in the interim actually enhances judicial efficiency by putting this case on a trial footing as soon as Mr. Fischer's deposition can be taken.

D. The Public Interest and Interests of Non-Parties

The public interest in resolving the civil claims at issue is substantial and weighs against a stay. Indeed, the presence in this case of two sovereigns (the United States and the Puyallup Tribe) acting on behalf of the public interest, as well as the participation of two citizen groups, demonstrates that the issues this case presents require quick resolution. In contrast to ATP Oil & Gas Corp., Motion at 7:10-12, here there is no parallel criminal proceeding by the United States under the CWA that might vindicate some of the same public interests as those at stake in the civil case, and the United States has not requested a stay. See 2013 WL 6184991. And, unlike the other two cases Electron Hydro relies on, Motion at 7:12-14, this is not a civil action involving only private interests that may appropriately be stayed in favor of a related criminal prosecution that vindicates the wider public interest. See Javier H. v. Garcia-Botello, 218 F.R.D. 72, 75 (W.D.N.Y. 2003) (granting government-intervenor's request to stay in part because "the public's interest in the integrity of the criminal case is entitled to precedence over" the private interests of the litigants); Jones v. Conte, 2005 WL 1287017, at *2 (N.D. Cal. Apr. 19, 2005) (staying case for the same reason). The public interest, like the interests of Plaintiffs and the Court, weighs against granting a stay. Given that Defendant has not demonstrated that it or Mr. Fischer will suffer "substantial prejudice" based on a "clear case of hardship or inequity," the Court should deny the Motion. See Keating, 45 F.3d at 324; Landis, 299 U.S. at 255.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendant's Motion to Stay Discovery Pending Resolution of Criminal Proceedings.

RESPECTFULLY SUBMITTED this 7th day of February, 2022.

s/ Eric D. Albert
Eric D. Albert

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2022, I filed the foregoing UNITED STATES' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT via the CM/ECF system, which will automatically send notice of such filing to all counsel of record herein.

DATED this day of February 2022.

s/ Eric D. Albert
Eric D. Albert